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PT KARYA SUMIDEN INDONESIA

v.

OCEANMASTERS MARINE SERVICES SDN BHD & ANOR

B

HIGH COURT MALAYA, KUALA LUMPUR
NALLINI PATHMANATHAN J
[CIVIL SUIT NO: 27-35-08-2013]
20 FEBRUARY 2014

C

CIVIL PROCEDURE: *Parties - Joinder of parties - Application for - Whether fell within exceptions to general rule in Dollfus Mie et Campagnie SA v. Bank of England - Whether there were questions or issues arising out of or connected with relief or remedy claimed - Whether application*
D *in place of third party proceedings - Whether an attempt to circumvent or avoid costs - Rules of Court 2012, O. 15 r. 6*

CIVIL PROCEDURE: *Security for costs - Application for - Plaintiff ordinarily resident out of jurisdiction - Whether defendants entitled to*
E *security for costs as of right - Whether plaintiff an entity with means and financial capacity to meet order of costs against it - Whether there were factors warranting inference that plaintiff would not meet order of costs*

The plaintiff entered into contracts for the carriage of goods with
F the second defendant ('D2') as carrier by sea of various consignments of copper wire rod from the Port of Tanjong Priok, Jakarta to the Port of Dammam in Saudi Arabia ('contracts of carriage'). The cargo was to be shipped pursuant to several contracts of sale ('contracts of sale') entered between the plaintiff
G as the seller and Jawad and Malik Metal Trading LLC ('JMM') as the buyer. JMM appointed the first defendant ('D1') to arrange for the shipments of cargoes from China, Indonesia and Malaysia on the condition that Super Express Cargo LLC ('Super Express'), whom JMM indicated was its local agent, to be used
H for all shipments including those with the plaintiff. Pursuant thereto, D1 entered into an agency agreement with Super Express. D1 appointed its local agent, PT Pratama Indo International Indonesia ('Pratama') in Indonesia to arrange for the loading of the cargo. The cargo was delivered into the custody of Pratama
I who issued its house bills of lading under the name of Sapphire Line ('Sapphire House bills of lading'). However, it appeared that

the cargo had been released at the Port of Dammam to an entity called al-Fanar without the due production or presentation or the original Sapphire House bills of lading, causing the plaintiff to lose its entitlement to the cargo without receiving consideration for the same. The plaintiff's primary cause of action was against D1, as the principal carrier of the cargo, for the release of the cargo without due production of the Sapphire House bills of lading. Further and alternatively the plaintiff brought a claim of conspiracy against the defendants. D1 maintained that at all times, it had acted as the agent to JMM and Super Express and thus any instructions issued by it to Pratama and/or other entities were instructions emanating from JMM and Super Express. Hence, three interlocutory applications arose for adjudication herein, *ie*: (i) an application by D1 for the joinder of JMM and Super Express as co-defendants in this action pursuant to O. 15 r. 6 of the Rules of Court 2012 ('ROC') and (ii) two individual applications by D1 and D2 seeking security for costs against the plaintiff.

Held (dismissing D1's application for joinder; dismissing defendants' applications for security for costs):

(1) The application for joinder did not fall within any of the exceptions to the general rule set out in *Dollfus Mie et Campagnie SA v. Bank of England*. Further, there did not appear to be a question or issue arising out of or connected with the relief or remedy claimed in the matter which required the presence of JMM or Super Express as co-defendants or which required the determination between the plaintiff and JMM or the plaintiff and Super Express. Hence, the application should not succeed. (paras 37, 38 & 39)

(2) It was open to D1 (and D2) to join JMM and Super Express as third parties if they so desired or required. However, an application for joinder ought not to be allowed in a place of third party proceedings in an attempt to circumvent or avoid costs. The parties sought to be joined as co-defendants herein were outside the jurisdiction, in Dubai, and service of the writ on them would entail time and costs. The plaintiff ought not to be further encumbered with costs and delay on a claim which was premised primarily on a failure to ensure delivery or discharge of goods against original bills of lading. There was no sufficient basis to force the plaintiff to bear both the delay

A and costs. In the circumstances, this was not a fit case for the exercise of the court's discretion under O. 15 r. 6 of the ROC. (paras 40 & 41)

(3) In each case, the court will balance the factors in the context B of each particular factual matrix and determine whether it would be just in the particular facts of that case to order security for costs. It is not an entitlement as of right. The fact that the plaintiff was a resident outside of jurisdiction without assets in this country did not entitle the defendants as of right C to security. The plaintiff was also an entity of some means and had the financial capacity and solvency to meet any order of costs and there were no factors warranting inference that the plaintiff would not meet any order of costs granted by the court at the end of the trial. Based on the unique factual D matrix of the case, this was not a fit or appropriate case for the court to exercise its discretion to order security for costs in favour of D1 and D2 against the plaintiff. Hence, the applications for security for costs were dismissed. (paras 48-50)

E **Case(s) referred to:**

Abidin Umar v. Doraisamy Supramaniam & Anor [1994] 2 CLJ 747 HC ***(refd)***

Dollfus Mieg et Campagnie SA v. Bank of England [1950] Ch 333 ***(foll)***

Eastacres Development Sdn Bhd v. Fatimah Mutallip & Anor [2000] 5 CLJ F *379 HC* ***(refd)***

Goldquest International Ltd v. Teh Leong Kiat [2003] 2 CLJ 402 HC

Hee Awa & Ors v. Syed Muhammad Sazalay & Anor [1987] 1 LNS 109 SC ***(dist)***

Kasturi Palm Products v. Palmex Industries Sdn Bhd [1985] 1 LNS 149 HC ***(refd)***

G *North Plaza Sdn Bhd v. United Securities Sdn Bhd [2010] 1 CLJ 470 CA* ***(refd)***

Raju Rajaram Pillai v. MMC Power Sdn Bhd & Anor [2000] 4 CLJ 189 HC ***(refd)***

Tajjul Ariffin Mustafa v. Heng Cheng Hong [1993] 3 CLJ 117 SC ***(refd)***

H *Wilson, Sons & Co Limited v. Balcarres Brook Steamship Company Limited [1893] 1 QB 422 CA* ***(foll)***

Legislation referred to:

Contracts Act 1950, s. 186

Rules of Court 2012, O. 23 r. 1

I Rules of the High Court 1980, O. 15 r. 6(2)(b), O. 16

For the plaintiff - Sitpah Selvaratnam (Rahayu with her); M/s Tommy Thomas
For the 1st defendant - Arun (Chew Pei Yee with him); M/s Sativale Mathew & Arun
For the 2nd defendant - Jeremy Joseph; M/s Joseph & Partners

Reported by S Barathi

JUDGMENT

Nallini Pathmanathan J:

Introduction

[1] Three interlocutory applications arise for adjudication in this matter. The first is an application for the joinder of two parties as co-defendants to this action, by the first defendant, OceanMasters Marine Services Sdn Bhd ('D1'). This application is opposed by the plaintiff, PT Karya Sumiden Indonesia ('plaintiff').

[2] The two other applications are made by the defendants individually, namely D1 and the second defendant, Sapphire Line Private Limited ('D2'), seeking security for their costs in this action against the plaintiff in the sum of RM150,000 each. It is further prayed that the action be stayed pending the provision of these monies, and that in the event the plaintiff fails to comply with any order granted, the action be dismissed.

Salient Facts

[3] The salient background facts have been comprehensively set out in the submissions of learned counsel for the plaintiff and the first defendant and the following outline is adopted from these submissions. Between May and June 2012, the plaintiff entered into contracts for the carriage of goods with D2 as carrier by sea of various consignments of copper wire rod ('the cargo') from the Port of Tanjong Priok, Jakarta to the Port of Dammam in Saudi Arabia. ('the contracts of carriage').

[4] The cargo was to be so shipped pursuant to several contracts of sale entered into between the plaintiff as seller and a party known as Jawad and Malik Metal Trading LLC ('JMM') as buyer. The sale of the cargo is evidenced by a sales agreement for

A 8mm Copper Wiring Rod 2012 and a master agreement dated 30 December 2011 as well as various purchase orders issued in relation thereto ('the contracts of sale'). The terms of these sale contracts provide for the shipment of the cargo to be FOB Jakarta and for payment of the price of the cargo to be against
B documents.

[5] The primary cause of action here revolves around the contracts of carriage, rather than the contracts of sale. The contracts of sale, as provided by the master agreement of 30
C December 2011, governed by an arbitration clause that provides for disputes or differences to be settled by arbitration in Tokyo.

[6] JMM, the buyer of the cargo, appointed D1 to arrange for the carriage of the cargo.

D **[7]** D1 then appointed its local agent, one PT Pratama Indo International Indonesia ('Pratama') in Indonesia to arrange for the loading of the cargo. The cargo was delivered into the custody of Pratama who issued to the plaintiff its house bills of lading under the name of Sapphire Line ('the Sapphire house bills of lading').
E In other words the Sapphire House Bills of Lading were so issued by Pratama as agent for D2 and/or sub-agent for D1 as carrier. In other words, the contracts of carriage are evidenced, *inter alia*, by D2's bills of lading or the Sapphire house bills of lading. They disclose the shipper to be the plaintiff and the consignee to be
F JMM. Delivery was to be given to JMM against the production of these original Sapphire house bills of lading. It should be noted that D1 maintains in its defence that it is not the carrier under the said Sapphire house bills of lading. It maintains that D2 is the carrier and that it has an agency agreement with D2.

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[8] The plaintiff maintains that the original Sapphire house bills of lading were submitted to the Bank of Tokyo-Mitsubishi ('the plaintiff's bank') between May to June 2012 for collection and/or exchange against payment by JMM of the price of each consignment
H of cargo in the total sum of USD5,921,979.80. However JMM failed to pay this price. The Sapphire house bills of lading and other relevant shipping documents were therefore returned to the plaintiff in August 2012.

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[9] The plaintiff maintains that it was advised on 2 August 2012 at a meeting with JMM that the cargo had been released at the Port of Dammam to an entity by the name of Fanar Electrical Systems ('Al-Fanar') without the due production or presentation of the original Sapphire house bills of lading.

[10] The plaintiff further avers that it was subsequently advised that D2 was at all times acting as agent to D1, and that all shipping instructions and arrangements in relation to the carriage of the cargo under the Sapphire house bills of lading were given by D1. For this reason the plaintiff contends that D1 is the principal carrier of the cargo under those Sapphire house bills of lading.

[11] The plaintiff's primary cause of action against D1 turns on the release of the cargo without due production of the Sapphire house bills of lading. This cause of action is premised in contract and/or in tort and/or in law as carrier and/or bailee of the cargo. It is maintained against D1 that such release amounts to a conversion of the cargo or the aiding of such conversion of the cargo, to the loss and detriment of the plaintiff.

[12] Further or alternatively the plaintiff also brings a claim of conspiracy against the defendants. In essence the plaintiff maintains that D1 and/or D2 jointly with JMM and others conspired to injure the plaintiff by agreeing to and causing or facilitating the release and/or delivery of the cargo at the Port of Dammam without the production of the original Sapphire bills of lading. As a consequence the plaintiff lost its entitlement to the cargo without receiving consideration for the same.

How Were The Goods Released?

[13] This is the central issue for adjudication at trial. No findings are made at this juncture in this respect. However the documentary trail of documents is relevant to enable the court to determine whether D1's application for the joinder of parties ought to be allowed. It is evident however that these matters are not within the direct knowledge of the plaintiff.

[14] It would appear from the pleadings and documents filed here that Pratama was to co-ordinate with the plaintiff on the loading of the cargo etc. Pratama was then to receive the sealed and

stuffed containers at the port for loading onto the vessel booked by D1, as agent for the JMM and Super Express for the contract of carriage.

[15] D1 arranged for China Shipping Container Lines (Hong Kong) Co Ltd ('China Shipping') to carry or transport the cargo. The cargo was duly loaded onto designated vessels.

[16] China Shipping then issued sea waybills naming Pratama as shipper and Al-Fanar as consignee of the cargo. The sea waybills carried the following statement:

> Delivery will be made to the Consignee or his authorised representative upon presentation of delivery receipt or other evidence of identity and authorisation satisfactory to the Carrier in its sole and absolute discretion without the need for producing or surrendering a copy of this Sea Waybill.

[17] D1 avers that these sea waybills issued by China Shipping merely operated as an acknowledgement of receipt of the containers stated in those bills of lading and not as documents of title. The plaintiff contends to the contrary.

[18] While the intervening facts remain very much in dispute, it appears that the cargo was released against "switched" bills of lading issued by one North American Cargo Inc. These switched bills of lading bearing the name of JMM as shipper and Al-Fanar as consignee. The cargo was released despite the existence of the unextinguished Sapphire house bills of lading which had been issued in respect of the exact same cargo and voyage. D1 maintains that it was unaware of the issuance and existence of these 'switched' bills of lading issued by North American Cargo Inc. until after the cargo had been discovered to be released. As such it denies any breach of duty and the allegation of conversion. It follows that D1 denies conspiracy or collusion in relation to the release of the cargo.

[19] It is relevant that after the release of the goods against the switched bills of lading, JMM issued a letter of indemnity dated 26 September 2012 agreeing to indemnify D2 and D1 in respect of the release of the cargo without the surrender or presentation or production of the original Sapphire house bills of lading.

The Application For Joinder Under O. 15 r. 6 By D1

[20] The first application that falls for adjudication before this court is the application by D1 for the joinder of two other parties as co-defendants in this action. The two parties sought to be joined are JMM and one Super Express Cargo LLC ('Super Express').

[21] At all times, as stated earlier, D1 was appointed as JMM's agent to arrange for the shipments of cargoes from China, Indonesia and Malaysia. It was a condition of this appointment that Super Express, whom JMM indicated was its local agent, be used as the local agent for all shipments including those with the plaintiff.

[22] To this end, D1 maintains that at the commencement of business with JMM, it had entered into an agency agreement with Super Express whereby D1 would act as agent of Super Express in all transactions involving JMM. This agency agreement has been exhibited in support of this application for joinder.

[23] D1 further maintains that in making arrangements for the carriage of the cargo, any instructions issued by it to Pratama and/or other entities, were instructions emanating from JMM and Super Express. As such, D1 maintains that it acted at all times as agent to JMM and Super Express. D1 further avers that as it is not a party to any contract with the plaintiff, both JMM and Super Express ought to be joined as co-defendants in this action.

[24] D1 further submits that since the delivery of the cargo was effected by JMM to Al Fanar, the end-consignee through the use of switched bills of lading issued by Super Express, the presence of both entities is necessary to ensure that all matters in dispute can be effectually and completely adjudicated upon. Without JMM and Super Express as parties, it is maintained that this court will not be able to elicit the true facts of how the cargo was released to the end-consignee against the switched bills of lading without surrender of the original Sapphire house bills of lading. In other words it is submitted for D1 that JMM and Super Express are essential parties for the effective adjudication of this case.

[25] With regards to the plea of conspiracy, D1 points to the statement of claim where the plaintiff avers that D1 and/or D2 jointly with JMM and/or other parties conspired to injure the

plaintiff by allowing through their combined efforts the release of the cargo against the switched bills of lading. Given this plea of conspiracy D1 maintains that the just and convenient means of adjudicating on the same will necessarily involve the presence of JMM and Super Express. As the central issue is the identity of the party that caused the release of the cargo against the switched bills of lading it is just and convenient for this court to join JMM and Super Express as co-defendants in this action so that all parties alleged to be responsible to the plaintiff may be examined and all facts made known to the court.

[26] The plaintiff in response objects vehemently to any such joinder, *albeit* of JMM or Super Express. The plaintiff maintains that the central issue in this case is the wrongful release of the cargo. It does not relate to non-payment for the price of the cargo against JMM which is the subject matter of arbitration. A distinction is drawn between the contract of sale and the contract of carriage and the point made that this suit relates to the latter. The only issue here is why sufficient care was not taken by the carriers in relation to the cargo and why release was allowed without the original Sapphire bills of lading. The plaintiff maintains that ultimately in so far as the plaintiff's case is concerned, it is the defendants who are primarily responsible to ensure the proper release of the cargo under the contract of carriage. JMM is not a necessary party in this respect. In so far as the conspiracy is concerned the plaintiff submits that its case is that D1 is the party primarily responsible under the contract of carriage and accordingly the presence of JMM and Super Express is not necessary.

[27] The plaintiff further maintains that it enjoys the right to choose which joint tortfeasor it wishes to proceed against and that it cannot be compelled to plead a case against both JMM and Super Express.

[28] As for the plea of conspiracy against the defendants, the plaintiff maintains that it can establish its case from the existing documents without the need for JMM and Super Express to be joined as parties. In this respect the plaintiff pointed out to several emails and evidence to support its contention that it was D1 that gave all instructions on contract of carriage and received freight from JMM for such arrangement. As such it is contended

that D1 was the 'mastermind' or 'controller' in respect of the contract of carriage and therefore ultimately responsible. The truth or otherwise of this contention will be tested at trial. However the upshot of the plaintiff's submission is that it is prepared to prosecute its claim in conspiracy on the basis of documentary evidence available, without the need for JMM or Super Express as parties.

[29] If indeed the presence of JMM and Super Express is found to be necessary, then it is submitted for the plaintiff that it is incumbent upon the defendants to join them as third parties to this action. The joinder of these parties ought not to be allowed merely for the benefit and convenience of D1 and D2.

The Position In Law In Relation To O. 15 r. 6

[30] D1 relies on the express provisions of O. 15 r. 6 which allows, *inter alia*, any person who ought to have been joined as a party or whose presence before the court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon. As such it is contended that JMM and Super Express (for the reasons set out above) are essential parties to this action to allow all matters in dispute before the court to be fully ventilated and considered in determining the responsibility of the party that allowed the release of the cargo wrongfully.

[31] D1 relies on the cases of, *inter alia*, *Hee Awa & Ors v. Syed Muhammad Sazalay & Anor* [1987] 1 LNS 109; [1988] 1 MLJ 300 and *Abidin Umar v. Doraisamy Supramaniam & Anor* [1994] 2 CLJ 747.

[32] In *Hee Awa*'s case (above) there was a road accident involving a motorcycle and a government motor van in which the pillion rider of the motorcycle was killed and a passenger in the motor van was injured. The injured passenger instituted an action in negligence against the motorcyclist. The van driver and the Government of Malaysia were made third parties. The parents and administrator of the estate of the pillion rider sought damages against the van driver and the Government of Malaysia. The van driver and the Government of Malaysia applied under O. 15 r. 6(2)(b) of the Rules of the High Court 1980 for an order that the motorcyclist be joined as a party. The High Court allowed the

motorcyclist to be joined as a co-defendant despite objections by the parents of the deceased pillion rider. The Supreme Court held that the application to add the motorcyclist as a co-defendant fell squarely within O. 15 r. 6(2)(b). It was held that the van driver and the Government of Malaysia had a choice to proceed under either O. 15 or O. 16. As such there was nothing to prevent them from opting for O. 15 r. 6.

[33] The Supreme Court further rejected the argument of the parents and administrator of the estate of the pillion rider who contended that the consequence of allowing the application for joinder would be unfavourable to them as compared to the adoption of third party procedure under O. 16 in the event that the motorcyclist turned out to be a man of straw although he was found to be substantially blamed for the accident. It held that this concern about financial advantage would be applicable to the van driver and the government equally if the third party procedure were to be adopted and there was no hope at all of them being indemnified or getting contribution from an impecunious motorcyclist.

[34] Similarly in *Abidin Umar v. Doraisamy Supramaniam* (above) it was held that the joinder ought to be allowed as the proposed co-defendant Salleh bin Ani could shed light on the salient facts and that for this reason it would be prudent to allow the joinder.

[35] However as submitted by learned counsel for the plaintiff, the Supreme Court decision of *Tajjul Ariffin Mustafa v. Heng Cheng Hong* [1993] 3 CLJ 117; [1993] 2 MLJ 143 specifically stipulated that the case of *Hee Awa* (above) did not prescribe any principle other than that found in the rules of court to govern the exercise of judicial discretion reposed in the court of first instance. It was further pointed out that *Hee Awa*'s case ought to be read in the light of the facts of that case, and should not be seen as imposing any fetter on the exercise of the discretion accorded to a judge when considering an application by the defendant to join another defendant against the wishes of the plaintiff, which is precisely the case here.

[36] The Supreme Court highlighted that the power of the court to add a defendant on the application of another defendant against the wishes of the plaintiff is entirely discretionary and the only fetter the rule places upon the exercise of that discretion is

that it should be exercised whether there may exist a question or issue arising out of or relating to or connected with any relief or remedy claimed in the cause or matter which in the opinion of the court it would be just and convenient to determine as between the person sought to be joined and that party as well as between the parties to the cause or matter. Edgar Joseph SCJ set out the principles to be distilled from the rules of court (see p. 151 of the decision). Of relevance to the instant suit include the following:

(1) …

(2) …

(3) …

(4) Generally, in common law and chancery matters, a plaintiff who considers that he has a cause of action against a defendant is entitled to pursue his remedy against that defendant alone and he cannot be forced to pursue his remedy against other persons who he has no wish to sue. (see per Wynn-Perry J in *Dollfus Mieg et Compagnie SA v. Bank of England*.)

(5) Nevertheless, a person who is not a party may be added as a defendant over the objections of the plaintiff on his own intervention or upon the application of the defendant or in some cases by the court of its own motion (see 1 Supreme Court Practice (1991) at p 193 para 15/6/71.)

(6) But, a defendant against whom no relief is sought by the plaintiff will generally not be added against the wishes of the latter. (see *Hood-Bars v. Frampton & Co*). A third party notice is in such a case usually the proper procedure to adopt though such a defendant can be added in a proper case. (see *Dollfus Mieg et Compagnie SA v. Bank of England*).

[37] And the case of *Dollfus Mieg et Campagnie SA v. Bank of England* [1950] 1 Ch 33 sets out both the general rule and the exceptions to the rule. In considering the English equivalent of O. 15, Buckley LJ held that in order to have a person joined as a party, the court must be satisfied either that the party 'ought to have been joined', or that his 'presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter'. He also pointed out that if the party were joined

as a defendant and the plaintiff did not make any allegation against it, the prospective defendant might ask to be dismissed from the action. This then was stated to be the general rule. The exceptions were also considered which Buckley LJ said could be divided into three classes:

(i) A representative action where the person seeking to intervene is one of a class whom the plaintiff claims to represent and the intervener is unwell to be so represented. In such a case he can insist upon being added as a defendant;

(ii) The second class is whether the proprietary rights of the intervener are directly affected by the proceedings; and

(iii) The third class comprises actions for specific performance of contracts where third parties have an interest in the question of the manner in which the contract should be performed.

[38] It is evident that the application for joinder in the instant case does not fall within any of the exceptions to the general rule. It is equally clear that this court should exercise its discretion to so join another defendant as a co-defendant against the wishes of the plaintiff only if there exists a question or issue arising out of, or relating to, or connected with any relief or remedy claimed in the cause or matter which in the opinion of the court it would be just and convenient to determine as between the person sought to be joined and that party as well as between the parties to the cause or matter.

[39] Applying that test to the present case it would appear that the application for joinder should not succeed because there does not appear to be a question or issue arising out of or connected with the relief or remedy claimed in the matter which requires the presence of JMM or Super Express as co-defendants or which requires determination as between the plaintiff and JMM or the plaintiff and Super Express. This is because:

(a) On a perusal of the pleadings, it is evident that the primary cause of action the plaintiff levels against the defendants is under the contract of carriage for the wrongful release of the cargo in that it was not against the Sapphire house bills of lading but against the "switched" bills of lading. This is an

issue which is governed by the contract of carriage, to which JMM is not an essential party for the purposes of the issue in dispute here;

(b) No relief is sought against either JMM or Super Express. The relief claimed against the defendants in this suit is in relation to the wrongful release of the goods, not for the price of the goods. As for Super Express it is not mentioned in the statement of claim and no allegation is made against it. Given the absence of any relief sought against JMM and Super Express, and given that the plaintiff cannot be forced to undertake an amendment of its claim to plead a case against these defendants, it is more than likely that any such joinder would result in applications being made by these parties to be struck out for want of a reasonable cause of action;

(c) The claim by the plaintiff against JMM relating to the price of the goods etc, is the subject matter of arbitration. Given the subsistence of an arbitration clause in relation to any dispute arising between the plaintiff and JMM, it would be untenable to join JMM as a co-defendant in the present action. It is most likely that the action might have to be stayed against JMM in view of that clause, given the provisions of the Arbitration Act 2005;

(d) Finally even if JMM and Super Express are co-defendants or may be liable, it remains the prerogative of the plaintiff, given the contract of carriage, to sue the party it wishes to. Similarly, with the plea of conspiracy, the plaintiff takes the position that D1 is primarily responsible, as it was party primarily responsible for arranging the contract of carriage. Here the plaintiff has chosen to pursue its case against D1 and D2. It is entitled to do so. If it is subsequently found that there is insufficient basis for its claim, then the claim will simply fail. In other words, the presence of JMM and Super Express does not appear to be absolutely necessary as co-defendants in this suit for it to be determined effectually, and I so find.

[40] In so finding I am greatly persuaded by the consideration that it is open to D1 (and D2) to join JMM and Super Express as third parties if they so desire or require. An application for joinder ought not to be allowed in place of third party proceedings in an attempt to circumvent or avoid costs. It appears to this

court that the plaintiff ought not to be further encumbered with costs and delay on a claim which is premised primarily on a failure to ensure delivery or discharge of goods against original bills of lading. It ought to be the defendants who taken on the onus of joining such other parties as they consider responsible for acts and/or omissions which they deny they have been party or privy to. This is particularly so when the plaintiff's primary contract of carriage is with D1 and/or D2 or both.

[41] In the instant case it is pertinent that both parties sought to be joined as co-defendants are outside of the jurisdiction, in Dubai. If the court were to order that they be joined as parties, the writ would have to be served on them. That must be done by complying with the requisite provisions for service out of jurisdiction. This will entail, as I have said earlier, both time and costs. There does not appear to this court to be sufficient basis to force the plaintiff to bear both the delay and the costs. I am supported in exercising my discretion in this manner by *inter alia*, the case of *Wilson, Sons & Co Limited v. Balcarres Brook Steamship Company Limited* [1893] 1 QB 422 (Court of Appeal) per Lord Esher:

> ... There is discretion therefore; and therefore, if one or two joint contractors were resident out of the jurisdiction, but the circumstances were such that the joinder of such joint contractor could not possibly delay the plaintiff or cause any real hardship or difficulty to him, the Court, I apprehend, would have a discretion to make an order that he should be joined; but I think that such a discretion ought to be exercised with the greatest caution. To say that, although a joint contractor resident abroad, there is an absolute right to have him joined, gives rise to many difficulties, which I have pointed out during the argument. Suppose the Court ordered that such a joint contractor should be joined. He must then be served; but a writ cannot be issued for service out of the jurisdiction without the leave of the Court. The Court has a discretion with regard to granting that leave ...
>
> I think therefore, that it was a matter of discretion whether the order should be made. It does not appear that by leaving the defendants to their remedy over against Benier, if they have any, we shall be doing any injustice to the defendants. If Benier is a joint contractor with them it would seem that there might be a right of contribution, and therefore the defendants could bring him in as a third party. If there is no right of contribution, then I

> cannot help thinking that the defendants are endeavouring to put on the plaintiffs the burden of suing a foreigner out of the jurisdiction for no real legal benefit to themselves, but for some indirect purpose ...

[42] The foregoing appears to sum up the case aptly. As the plaintiff's claim, by its own plea and submission, does not require the presence of JMM and Super Express as parties, much less co-defendants, then the plaintiff ought not to be forced to make them parties simply because the defendants may be entitled to an indemnity or contribution from these parties. It must be incumbent upon the defendants to undertake third party proceedings rather than to force the plaintiff to join them as co-defendants. I am satisfied that this is not a fit case for the exercise of my discretion under O. 15 r. 6. Therefore D1's application for the joinder of JMM and Super Express is dismissed. They remain at liberty to bring third party proceedings if they so deem fit.

Applications For Security For Costs By The Defendants Against The Plaintiff

[43] The plaintiff is a foreign company with no assets within the jurisdiction. The defendants therefore seek security for the costs of action in the sum of RM150,000 each. They premise their applications under O. 23 r. 1 of the Rules of Court 2012.

[44] Order 23 r. 1 confers upon the court a discretion as to whether and to what extent a plaintiff is to be ordered to provide security for costs.

[45] The defendants maintain that it is just and appropriate for the plaintiff to be ordered to give security because:

(a) The plaintiff is resident out of the jurisdiction;

(b) The plaintiff has no assets within the jurisdiction; and

(c) Any order for costs granted by this court in favour of D1 as against the plaintiff would be difficult to enforce as there is no reciprocal enforcement of judgments as between Malaysia and Indonesia.

(see *Raju Rajaram Pillai v. MMC Power Sdn Bhd & Anor* [2000] 4 CLJ 189; *Goldquest International Ltd v. Teh Leong Kiat* [2003] 2 CLJ 402).

A (d) The defence of the defendants discloses a formidable and meritorious defence to the plaintiff's claim, as it denies owing any duty of care to the plaintiff as it is not party to any contract with the plaintiff. By reason of the pleaded defence and factual matrix, the defendants maintain that they enjoy a
B strong likelihood of success. Accordingly it is submitted that security for costs ought to be ordered.

[46] The plaintiff on the other hand points out that it is trite that:

C (a) A court will not order security for costs solely on the basis that the plaintiff is a foreign party;

(b) It is a matter of discretion and the court will only do so if it is just in the circumstances of the case to do so;

D (c) In exercising its discretion the court will take into consideration the *bona fide* of the plaintiff's claim, the likelihood of success of the plaintiff's claim and the merits of the defence.

E (see *Kasturi Palm Products v. Palmex Industries Sdn Bhd* [1985] 1 LNS 149; [1986] 2 MLJ 310 at p. 311 per Mohamed Dzaiddin J (as he was))

[47] The plaintiff further submits in response that it is a subsidiary
F of Sumitomo Electric Industries Ltd of Japan with a history dating back to 1897. Its audited accounts for the financial year ended 31 March 2013 recorded total assets of USD 197.8 million. The plaintiff maintains that its primary cause of action is strong in that D1 and D2 have no real defence to the claim for the wrongful
G release of the cargo to unauthorised persons without production of the original bills of lading. In other words, the plaintiff maintains that it has very good prospects of succeeding in its claim against the two defendants. In this context the plaintiff relies, *inter alia*, on s. 186 of the Contracts Act 1950, which allows for the claim
H to be made against both principal and agent who may be held jointly liable.

[48] It is evident that in each case the court will balance the factors stipulated above in the context of each particular factual
I matrix and determine whether it would be just in the particular facts of that case to order security for costs. It is not an

entitlement as of right. (See also *North Plaza Sdn Bhd v. United Securities Sdn Bhd* [2010] 1 CLJ 470; [2010] 1 MLJ 631 and *Eastacres Development Sdn Bhd v. Fatimah Mutallip & Anor* [2000] 5 CLJ 379; [2000] 7 MLJ 371). A

[49] I have considered the unique factual matrix of the instant case. I have determined that this is not a fit or appropriate case for this court to exercise its discretion to order security for costs in favour of D1 and D2 against the plaintiff for the following reasons: B

(a) The fact that the plaintiff is resident outside of the jurisdiction without assets in this country does not entitle the defendants as of right to security; C

(b) I am satisfied that the plaintiff is an entity of some means and has the financial capacity and solvency to meet any order of costs that might be made against it; D

(c) There appear to be no factors which warrant any inference that the plaintiff that has submitted to this jurisdiction, will not meet any order of costs granted by this court at the end of trial; E

(d) Given the factual matrix of this case, which I have detailed at some length at the beginning of this judgment, it does not appear to this court to be just for security to be ordered to be provided by the plaintiff in respect of any possible order of costs that might be made against it in favour of the defendants. In so determining I am persuaded by the relative merits of the plaintiffs' case, as it appears at this juncture. While the defendants may indeed have a good and *bona fide* defence to the plaintiff's claim, it would appear, at this juncture at least, to entail contribution from other parties, rather than providing a complete and meritorious defence to the plaintiff's claim in so far as the failure to deliver against original bills of lading is concerned. F G H

[50] I therefore exercise my discretion to refuse the applications for security for costs filed by both the defendants. Enclosures 21 and 27 are therefore dismissed. I